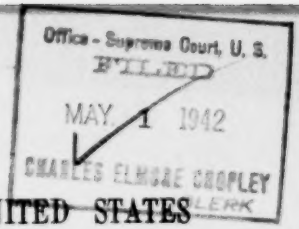

(4)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1201

ENGINEERS CLUB OF PHILADELPHIA,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JOHN E. HUGHES,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Engineers Club of Philadelphia, by John E. Hughes, its attorney, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on November 3, 1941. Motion for a new trial was filed January 2, 1942 and allowed February 2, 1942 and the judgment ordered to stand.

Opinion Below.

The findings and opinion of the Court of Claims (R. 6 to 26) are reported in 42 F. Supp. 182.

Jurisdiction.

A timely motion for new trial was allowed February 2, 1942 and the original judgment ordered to stand (R. 5). This petition for certiorari was filed May 1, 1942.

Statute and Regulation Involved.

These are set forth in the appendix.

Questions Presented.

Is a former judgment of the United States District Court in a suit between the same parties, holding petitioner not to be a social club and non taxable, res judicata for a subsequent period in which its charter, purposes and activities were found to be the same as the period covered by the District Court judgment?

If not, is petitioner taxable as a social club?

Statement.

Facts Bearing on Res Judicata.

Petitioner paid dues tax from 1917 until 1921, when the then Commissioner of Internal Revenue ruled it was not a social club and not taxable as such and refunded the tax it had paid. In 1932 the then Commissioner overruled the decision of his predecessor and held it taxable as a social club. (Finding 8, R. 9.)

Petitioner paid the tax from then to July, 1935 when it sued both the United States and the Collector in the district court, for different parts of this period, to recover said tax on the ground that it was not a social club and not taxable. After a long trial the district court rendered its findings of fact and conclusions of law and held petitioner not a social club and not taxable and entered judgment for the recovery of the tax paid. (See finding 10, R. 12-14.)

The government appealed said judgments to the Circuit Court of Appeals but dismissed its appeal and paid them, on petitioner's agreeing to waive interest. (R. 14.)

The Court of Claims made the following finding of fact in this suit:

> "During the period involved in the suits before the District Court and the period involved in this suit plaintiff's charter and its purposes and activities were of substantially the same nature and extent." (R. 14, finding 11.)

FACTS BEARING ON SOCIAL CLUB QUESTION.

Petitioner is an organization of professional engineers. Since the tax was enacted in 1917 uniform treasury regulations have stated, without change, and now state that the purpose of a club is the test and that "the tax does not attach to the dues of a * * * commercial club, * * * trade organization, or the like merely because it has incidental social features". (See Appendix, p. 12 for regulation.)

Petitioner's charter stated its purpose thus:

> "To promote the Arts and Sciences connected with Engineering, by means of periodical meetings for reading and discussion of professional papers, and the circulation by publication among its members and others of the information thus obtained, and for social intercourse!" (Finding 1, R. 6.)[1]

Failure to File Powers of Attorney.

This issue, raised in the concurring opinion which is based solely on that ground, was decided in petitioner's favor by the Court of Claims in *Builders Club of Chicago*

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[1]At the time this charter was obtained it was necessary to include the phrase "for social intercourse" to get a charter for a club. See Union Club of Pittsburgh v. Heiner, 99 F. (2d) 259, 263.

v. *United States,* 83 C. Cls. 556, 14 F. Supp. 1020, and in the case at bar the majority of the court below indicated no intention to depart from that decision and the question is not raised here.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In failing to hold that the judgment of the District Court in the suit against the United States was res judicata of the same issue in this case.

2. In failing to hold that the judgment of the District Court in the suit against the Collector was res judicata of the same issue in this case.

3. In failing to hold petitioner was not taxable as a social club.

Reasons for Granting the Writ.

1. As Judge Whitaker states in his concurring opinion (R. 19) the decision of the majority of the court below is in conflict with the decision of this Court in *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620.

Also the decision below means there is no such thing as res judicata in a club tax case or similar tax case, where different periods are involved although the facts are the same in both and opens the way to endless litigation.

2. Even if this were not so the decision below is, on the issue of whether plaintiff is a social club, in conflict with the following decisions holding the following clubs not taxable as social clubs: Cosmos Club of Washington, 42 F. (2d) 321; Bankers Club of New York, 37 F. (2d) 982; Builders Club of Chicago, 58 F. (2d) 503; Chemists Club of

New York, 64 C. Cls. 156; Columbia University Faculty Club in *Tidwell* v. *Anderson,* 72 F. (2d) 685 (C. C. A. 2nd).

In its response to the petition for certiorari in *Army & Navy Club* v. *United States,* No. 656 herein, October term 1931, cer. den. 285 U. S. 548, the government stated as follows at page 4 thereof:

> "The provision of the Treasury regulations that a club with social features is not a social club unless these features are not a 'material' purpose but are 'subordinate and merely incidental' to the furtherance of a non social purpose, has given rise to confusion in the administration of the law and has caused widespread conflict of judicial decision. In some cases it has been held, erroneously as we contend, that if a predominant non social purpose can be established, then any other purpose of a social nature is merely incidental. * * * Each case of this kind must depend upon the purposes and activities of the particular club, but the confusion in the decisions dealing with clubs which offer extensive social opportunities to their members, although organized for purposes not exclusively social, is such that the question presented in this case seems to us worthy of review in this court."

Since the government made that statement the decisions have increased rather than dispelled the confusion. As said in the dissenting opinion of Judge Learned Hand in *Tidwell* v. *Anderson,* 72 F. (2d) 684, 688:

> "The decisions have left the test chaotic."

The decision below on the res judicata issue, if upheld, will greatly increase litigation under this section of the statute and many of the cases already decided will be again litigated and repeatedly relitigated, especially if the present chaotic state of the law is not clarified.

This phase of the question never has been passed on by this Court and for the foregoing reasons ought to be settled.

All of which is respectfully submitted.

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